

WHEREFORE, it is respectfully requested that this Court grant Flintlock's motion to vacate the default judgment and allow Flintlock to interpose an answer in this proceeding, and for such other and further relief as this Court may seem just and proper.

Dated: Great Neck, New York
February 20, 2007

HOLLANDER & STRAUSS, LLP
Attorneys for Defendant Flintlock

By: 

Michael R. Strauss (MS7780)
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Great Neck, New York 11021
(516) 498-1000

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

IRA EVERETT, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside in Queens County, New York. On the 20th day of February, 2007, I served the within **REPLY AFFIRMATION TO: (A) REOPEN BANKRUPTCY CASE; and (B) SET ASIDE DEFAULT JUDGMENT** upon:

KURTZMAN, MATERA, GUROCK, SCUDERI & KARBEN, LLP
Attorney for Debtor-Plaintiff
S&S Fire Supression Systems, Inc.
2 Perlman Drive
Spring Valley, New York 10977

by transmitting the papers (i) by electronic means to the telephone number (845) 352-8865, which number was designated by the attorney for such purpose and I received a signal from the equipment of the attorney served indicating that the transmission was received, and upon:

ROBERT J. MCGOEY, ESQ.
Attorney for Defendant
Tap Plumbing & Heating, Inc.
271 North Avenue, Suite 1012
New Rochelle, New York 10801

by transmitting the papers (i) by electronic means to the telephone number (914) 636-7269, which number was designated by the attorney for such purpose and I received a signal from the equipment of the attorney served indicating that the transmission was received, and (ii) by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York, addressed to the persons set forth above.


IRA EVERETT

Sworn to before me this
20th day of February, 2007

JULIE L. PESCE
Notary Public, State of New York
01PE5075448
Qualified in Nassau County
Commission Expires March 31, 2007

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In Re: : 04-22183
: :
S&S FIRE SUPPRESSION SYSTEMS, INC., : 300 Quarropas Street
: White Plains, NY
Debtors. : February 22, 2007
-----X
S&S FIRE SUPPRESSION SYSTEMS, INC., : 05-08645
: :
Plaintiffs, : :
: :
v. : :
: :
TAP PLUMBING & HEATING, INC. and : :
FLINTLOCK CONSTRUCTION SERVICES, LLC, : :
: :
Defendants. : :
-----X

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE ADLAI S. HARDIN, JR.
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiff: ROSEMARIE E. MATERA, ESQ.
Kurtzman, Matera, Gurock,
Scuderi & Karben
2 Perlman Drive
Spring Valley, New York 10977

For Flintlock: MICHAEL STRAUSS, ESQ.
Hollander & Strauss, LLP
40 Cutter Mill Road
Great Neck, New York 11021

Court Transcriber: SHARI RIEMER
TypeWrite Word Processing Service
356 Eltingville Boulevard
Staten Island, New York 10312

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

1 THE CLERK: S&S Fire Suppression.

2 THE COURT: Hello.

3 ALL ATTORNEYS: Good morning, Judge.

4 THE COURT: Okay.

5 I know Ms. Matera. Whom do I have --

6 MR. STRAUSS: Michael Strauss of Hollander & Strauss
7 for defendant Flintlock Construction Services.

8 THE COURT: Okay.

9 Ms. Matera for S&S?

10 MS. MATERA: Good morning, Judge.

11 Rosemarie Matera for S&S. Yes.

12 THE COURT: All right.

13 Well, Mr. Strauss, I've read these papers and I guess
14 I have a problem with your client's position here.

15 Look, they were served, although you say defectively,
16 but they actually received the process.

17 MR. STRAUSS: That is correct, Your Honor.

18 THE COURT: They did nothing to make a motion to
19 quash the purportedly inaccurate process. Your client did
20 nothing to appear at the initial pre-trial conference. Your
21 client received the motion for a default judgment. Your client
22 filed no paper in response to the motion for a default
23 judgment. Somebody from your office -- I don't know whether it
24 was it was you or Mr. Hollander or who -- appeared -- well,
25 first of all, by telephone requested an adjournment of the

1 motion to dismiss. I denied that. No papers were filed prior
2 to the motion for a default judgment. The transcript speaks
3 for itself.

4 I pointed out to Mr. Hollander, was it, Ms. Matera?

5 MS. MATERA: Yes, Judge, it was Mr. Hollander.

6 THE COURT: On the record -- there's a transcript of
7 that, I didn't remember it -- but I pointed out to Mr.
8 Hollander that in all that time despite acknowledgment that the
9 complaint was received nothing was done. Your client simply
10 ignored it and I said, well, the plaintiff here is entitled to
11 a default judgment. If you want to make a motion to vacate the
12 default, you can make a motion to vacate the default. I don't
13 even have any papers on the basis of which I would deny the
14 motion for a default judgment and your partner said that he
15 understood that in words or substance.

16 Nothing was done for a year. In the meanwhile, the
17 lawsuit went on against TAP Plumbing & Heating. In your reply
18 submission, that is to say your client's -- I don't know
19 whether you signed it or Mr. Hollander -- you state that there
20 was no prejudice. Of course, there was prejudice. Putting
21 aside the delay -- and that is prejudice -- it's now more than
22 a year and a half since this adversary proceeding was commenced
23 to recover an account receivable that's based upon a letter or
24 two that was annexed to the complaint. Was there prejudice?
25 Of course, there was prejudice. The adversary proceeding went

1 forward against TAP. While your client was doing nothing the
2 adversary proceeding went forward. I don't remember what
3 happened.

4 You mentioned that there was a summary judgment?

5 MS. MATERA: Summary judgment. Your Honor granted
6 the summary judgment motion.

7 THE COURT: To whom?

8 MS. MATERA: In favor of S&S.

9 THE COURT: S&S.

10 So, of course, there is prejudice. Apparently, there
11 was a cross-claim by TAP against your client. That was
12 ignored. I don't know what the status of that is. I don't
13 know whether they ever made a motion or not.

14 MS. MATERA: Your Honor, TAP had a state court action
15 going against Flintlock which actually the state court judge --

16 THE COURT: Oh.

17 MS. MATERA: -- I just got the decision yesterday --
18 decided in favor of TAP so I imagine that's why they didn't
19 proceed with the cross-claim.

20 THE COURT: I see. I see.

21 So, yes, absolutely there was prejudice especially
22 given the proffer, although it's not much of a proffer of a
23 defense, it inextricably involves TAP. So, yes, there
24 absolutely was prejudice. The lawsuit was litigated.

25 As far as the wilfulness of the delay is concerned,

1 there can be no question of the wilfulness of the default.
2 Your client, whether defectively or not, was served. Your
3 client acknowledges that. Your client turned it over to an
4 attorney.

5 Now, maybe Mr. Mahoney or Maloney, whatever his name
6 was, was sickly as you referred to him but that's your client's
7 problem. That shouldn't be S&S' problem. In any event, it was
8 eventually turned over to lawyers that were not sickly, namely
9 your firm, and your firm didn't do anything about it other than
10 to make a phone call asking for an adjournment which I declined
11 and even then failing to put in any papers and then failing for
12 a whole year to do anything at all and in the meanwhile the
13 litigation went forward against the co-defendant in a
14 circumstance where the claims of the plaintiff, S&S, against
15 both TAP and your client were inextricably involved with each
16 other, the lawsuit went forward and went to a conclusion.

17 So is there prejudice? Absolutely, there's
18 prejudice. Is there wilfulness? Absolutely. Your firm knew
19 that the suit was going forward and just didn't do anything
20 about it. I don't know whether it was your choice or your
21 client's choice but, you know, you've got to help me to
22 overcome what I've said because I don't know how I could
23 possibly grant your motion on the facts that are presented
24 before me. It's not a question of my doing equity and well,
25 the courts of New York like to have matters resolved on the

1 merits. Yes, everybody likes to have matters resolved on the
2 merits. I do, too, but you had your chance and nobody did
3 anything despite the fact that at all times your client knew
4 that it was being sued. So you have to help me to --

5 MR. STRAUSS: I'm happy to do so.

6 THE COURT: -- if there's any possible way I could
7 reopen this case. I don't see it.

8 MR. STRAUSS: Okay.

9 First of all, with respect to the Court's perception
10 that my client did nothing, my client promptly turned over the
11 summons and complaint and the motion for default to its
12 longstanding counsel, John Mahoney. This is not someone they
13 found on a street corner, this is someone -- an attorney with
14 whom they had a longstanding relationship and they had every
15 reason to believe that Mr. Mahoney would protect their
16 interests as he had done in the past. As it turns out he did
17 not.

18 Now, our motion is not grounded upon excusable
19 neglect but with respect to the consequences of Mr. Mahoney's
20 failure to timely act to say that my client did nothing with
21 all due respect, I believe, is incorrect. They did what --

22 THE COURT: But let me ask you this.

23 On whose back should the adverse consequences of Mr.
24 Mahoney's sickness or whatever his default was fall? There's
25 got to be a consequence and is that consequence to be laid on

1 the shoulders of the plaintiff or on the shoulders of your
2 client?

3 MR. STRAUSS: Well, I think the Court has to look at
4 the totality of the circumstances. I understand and generally
5 agree with the Court's perception that delay is prejudice but
6 in the context of this case, the case was closed at the end of
7 May 2006 and effectively at least in my view there was no --
8 other than the time issue there is no cognizable prejudice to
9 the plaintiff. There's no increased difficulty of discovery,
10 there's no loss of evidence --

11 THE COURT: Let's go back for a moment. We'll get to
12 prejudice.

13 MR. STRAUSS: Okay.

14 THE COURT: But let's go back to Mr. Mahoney.

15 Assuming that your client for some reason should not
16 be the party as between the plaintiff and your client to suffer
17 the consequences of Mr. Mahoney's default if it really can be
18 laid at Mr. Mahoney's -- what about your firm?

19 MR. STRAUSS: Well, my understanding is that my
20 partner was contacted --

21 THE COURT: Because your firm was not sickly, neither
22 you nor Mr. Hollander were or are sickly so far as has been
23 suggested. You knew that your client was in default -- your
24 firm -- your client sure knew it by that time but still nobody
25 put any papers in. Nobody did anything. Nobody put an answer

1 in. That's very simple to put an answer in before -- it could
2 do that in half a day. It's very simple to put an answer in
3 before the return date of the motion for a default judgment.
4 Even between the time that your Mr. Hollander called my
5 chambers for an adjournment and the return date of the motion
6 there was time to put an answer in and some kind of a piece of
7 paper saying, please, give us a chance to litigate this on the
8 merits, we want to be a part of this lawsuit, which wasn't done
9 and then your firm waited a year to do what was spoken of right
10 at the hearing. It's in the transcript.

11 Why don't you address that --

12 MR. STRAUSS: Okay.

13 THE COURT: -- before we get to prejudice and we will
14 get back to prejudice.

15 MR. STRAUSS: Okay.

16 My recollection or my understanding is that there was
17 no opportunity for Mr. Hollander to prepare opposition to the
18 motion and I believe a default had already been entered before
19 we were ever contacted by the client.

20 THE COURT: No, no, that's false.

21 The procedure is that -- I'm sure that you know this
22 and are competent in your job -- the clerk's office enters a
23 piece of paper noting the default. That had been entered.

24 MR. STRAUSS: Yes.

25 THE COURT: On the basis of that then the plaintiff

1 makes a motion for a default judgment and you were retained
2 before the return date of the motion by your own affidavits.

3 MR. STRAUSS: That's correct.

4 THE COURT: Okay.

5 MR. STRAUSS: So there was ample time before the
6 return date and before any judgment was entered to have filed
7 an answer and a document. You might have had to stay up all
8 night to do it but it could have been done. That's what
9 lawyers do. But your client didn't do it and you didn't do it
10 and then despite a conversation on the record on whatever the
11 date was -- the 25th of January --

12 MS. MATERA: The 25th of January. Yes, Judge.

13 THE COURT: -- in which I said to Mr. Hollander,
14 "Look, they're entitled to a judgment of default. This motion
15 has not been opposed. You don't have anything to oppose it
16 with here. You come in empty-handed. You can make a motion to
17 vacate the default" and I don't remember his exact words but
18 it's in the transcript and he manifested an understanding of
19 what I was saying and then you waited a year to make the
20 motion, a complete, full 365 day year to make the motion during
21 which time the litigation ran its course. It was probably done
22 in a matter of months.

23 MS. MATERA: We did depositions of TAP. We did
24 document production and then my recollection is in April we
25 made, along with the final pre-trial order -- we did all the

1 work -- we made the motion for summary judgment and Your Honor
2 granted it and then the case was closed in May.

3 THE COURT: Okay.

4 So there was clearly here wilful and inexcusable
5 delay.

6 Now, you know, there's nothing you can tell me that's
7 going to change that and it was delayed by your client and by
8 your firm.

9 Now, as far as prejudice is concerned you just heard
10 it. The whole litigation was conducted; documents were
11 exchanged, depositions were taken, a dispositive motion was
12 made all while your client was sitting out there and your firm
13 letting it all happen and then you waited until a full year,
14 long after the case had been closed -- the adversary proceeding
15 was closed -- and now you make a motion and you want to start
16 the litigation again. That's prejudice.

17 MR. STRAUSS: Well, the case was closed roughly four
18 months after the return date of the motion for a default
19 judgment.

20 THE COURT: Is that when it was closed?

21 MS. MATERA: Yes, Judge, but we proceeded with TAP.

22 THE COURT: Fine. The whole litigation went forward
23 and was completed.

24 MR. STRAUSS: But one of the points I think the Court
25 needs to understand is that the basis for liability for TAP is

1 distinct and different than the basis for liability against
2 Flintlock. I believe that our papers clearly show a
3 meritorious defense. It's based on a written guaranty that
4 effectively says if and when we pay TAP, we will pay you up to
5 a certain dollar amount, and that never occurred. In other
6 words, the liability under the letter guaranty never triggered.

7 THE COURT: Okay. Fine.

8 I don't know whether you had a meritorious defense or
9 not. I haven't the slightest idea but your client and your
10 firm had ample opportunity to have your day in court. You
11 waived it.

12 The motion is denied.

13 Would you please submit an order?

14 MS. MATERA: Yes, Judge.

15 THE COURT: Thank you.

16 * * * * *

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I certify that the foregoing is a transcript from an
electronic sound recording of the proceedings in the above-
entitled matter.

SHARI RIEMER

Dated: March 10, 2007

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
In re:

Chapter 11
Case No. 04-22183(ASH)

S&S Fire Suppression Systems, Inc.

Debtor.

----- X
S&S Fire Suppression Systems, Inc.

Adv. Pro. No. 05-08645-ASH

Plaintiff,

v.

TAP Plumbing & Heating Inc., and
Flintlock Construction Services, L.L.C.,

Defendants.

----- X

**ORDER DENYING MOTION OF FLINTLOCK CONSTRUCTION SERVICES, LLC
TO REOPEN ADVERSARY PROCEEDING AND SET ASIDE DEFAULT JUDGMENT**

Upon the motion ("Motion") of Flintlock Construction Services, LLC ("Flintlock") To Reopen Adversary Proceeding and Set Aside Default Judgment, by and through its attorneys, Hollander & Strauss, LLP, filed with the Clerk of the Court on January 26, 2007, and the Opposition of S&S Fire Suppression Systems, Inc. ("S&S") by and through its attorneys Kurtzman Materna Gurock & Scuderi, LLP; and the Reply of Flintlock ; and a hearing having been held on February 22, 2007, and counsel for Flintlock and S&S having appeared; after due deliberation and the Court having orally ruled from the bench, it is

ORDERED, that the Motion be and the same hereby is denied.

Dated: White Plains, New York
February 28, 2007

/s/ Adlai S. Hardin, Jr.
Adlai S. Hardin Jr.
United States Bankruptcy Judge

Michael R. Strauss (MS7780)
Hollander & Strauss, LLP
40 Cutter Mill Road Suite 203
Great Neck, New York 11021
Flintlock Construction Services, LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re:

S&S FIRE SUPPRESSION SYSTEMS, INC.,

Chapter 11

Case No.: 04-22183 (ASH)

Debtor.

-----X

S&S FIRE SUPPRESSION SYSTEMS, INC.,

Plaintiff,

Adv. Pro. No. 05-08645 (ASH)

-against-

TAP PLUMBING & HEATING, INC., AND
FLINTLOCK CONSTRUCTION SERVICES, LLC.,

Defendants.

-----X

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that defendant Flintlock Construction Services, LLC ("Flintlock"), appeals pursuant to 28 U.S.C. 158 (a) or (b) from the Order of the Honorable Adlai S. Hardin, Jr., United States Bankruptcy Judge, entered in this adversary proceeding on February 28, 2007 which denied Flintlock's motion to vacate the default judgment entered against Flintlock herein on January 27, 2006.

The names of the parties to the judgment, order or decree appealed from and the names, addresses and telephone numbers of their respective attorneys are as follows:

**KURTZMAN, MATERA, GUROCK,
SCUDERI & KARBEN, LLP**

Attorney for Debtor-Plaintiff
S&S Fire Suppression Systems, Inc.
2 Perlman Drive
Spring Valley, New York 10977

ROBERT J. MCGOEY, ESQ.

Attorney for Defendant
Tap Plumbing & Heating, Inc.
271 North Avenue, Suite 1012
New Rochelle, New York 10801

Dated: March 9, 2007

HOLLANDER & STRAUSS, LLP

Attorneys for Defendant
Flintlock Construction Services, LLC

By: 

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